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No. 04-905

IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petitioners. Petitioner has consented to the filing of this brief; its letter of consent has been lodged with the Clerk of the Court. Counsel for Respondent declined to give consent, thereby necessitating this motion.

WLF is a public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., Texaco v. Dagher* (Nos. 04-805 and 04-814, petitions filed Dec. 14, 2004); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States Tobacco Co. v. Conwood Co., cert. denied*, 123 S. Ct. 876 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003).

WLF is concerned that the decision below would greatly expand the scope of unlawful price discrimination within the Eighth Circuit, and thereby create inordinate uncertainty among product manufacturers in national markets regarding the scope of proscribed conduct under the Robinson-Patman Act. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

Respectfully submitted,

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February 4, 2005

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] The interests of the *amicus* are set out in the motion for leave to file accompanying this brief.

ARGUMENT

I. This Court Should Address Whether A Transaction Involving No Purchase Satisfies The Act's "Purchaser" Requirement.

The Robinson-Patman Act by its terms would appear to indicate that only actual purchasers who have paid a discriminatory price are within the scope of the Act. The Act provides in pertinent part that it is "unlawful . . . to discriminate in price between different *purchasers* of commodities of like grade and quality." 15 U.S.C. § 13(a). The court below and the Fifth Circuit have reached opposing conclusions as to whether non-purchasers, such as the plaintiff here, can obtain money damages under the Act based on bids in which they were unsuccessful and thus led to no purchase.

The court below examined the practice in which Volvo and other truck manufacturers provide discounts on a case-by-case basis to dealers seeking to bid on truck contracts. The court determined that this "industry-standard practice,"[2] Pet. App. 2a, amounted to a violation of the Act where plaintiff alleged that Volvo had offered it a lesser discount (offered a higher wholesale price) than it offered to other dealers involved in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

[2] *See also Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998) (rejecting similar Robinson-Patman Act challenge to Ford's wholesale truck discounting).

different bidding processes for different customers with different requirements. The court conceded that "an unsuccessful bidder is not a purchaser within the meaning of the [Act]." Pet. App. 9a. The court held, however, that losses from plaintiff's unsuccessful bids could nonetheless be a basis of liability and could be incorporated into the damages award. Pet. App. 17a-20a.

The dissenting judge argued that except in the four instances where plaintiff allegedly purchased trucks from Volvo at a discriminatory price, the transactions at issue – the losing bids – were outside the scope of the Act and were not properly included in a damages award. Pet. App. 28a.

In contrast to the approach of the panel majority in the court below, the Fifth Circuit has required an actual purchase as a condition for a claim under the Act, and held that a transaction involving a mere bid, absent a purchase, does not meet that requirement. *M. C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1067 (5th Cir. 1975).

The fact that plaintiff Reeder-Simco GMC was successful in *some* bids does not meaningfully distinguish this case from *M. C. Mfg. Co.* with regard to the larger number of bids at issue that led to no purchase by Reeder-Simco GMC. The truck pricing in the unsuccessful bids were, by definition, not violations of the Act, and thus plaintiff cannot meet its burden with respect to those bids. "Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969)

The Fifth Circuit in *M. C. Mfg. Co.* acknowledged that an earlier decision, *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951), "appears to create a special exception to the two-purchaser requirement where *competitors in the same market* are engaged

in competitive purchasing and selling at the time of the price discrimination and where the failure of the plaintiff to consummate a second purchase of the item discriminatorily priced is directly attributable to defendant's own discriminatory practice." 517 F.2d at 1067 n.17 (emphasis added). This exception to the requirement of an actual purchase has been characterized as "an aberration." Hugh C. Hansen, *Robinson-Patman Law: A Review And Analysis*, 51 Fordham L. Rev. 1113, 1218 n.79 (1983). Here, as further elaborated in the following part, plaintiff Reeder-Simco GMC is not in competition with the purchasers who allegedly received preferable discounts; thus, plaintiff is not within the exception recognized by the Fifth Circuit in any event.

It is true that the approach of the Fifth Circuit – and, *amicus* believes, the approach dictated by the statutory text – leaves some instances of price discrimination uncompensated in the context of competitive bidding. This is a reflection of the fact that the Act is deliberately limited in scope, generally geared toward maintaining fairness in conventional retail-wholesale pricing programs.[3] *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (Rule 10b-5 suits available only to actual purchasers and sellers of shares, not to those who are misled by defendant's fraud into not purchasing).

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[3] This is far from the only dimension in which the Act is limited in scope. For example, the Act does not cover transactions involving services, applying by its terms only to "commodities." *See* Mark Klock, *Unconscionability and Price Discrimination*, 69 Tenn. L. Rev. 317, 358-61 (2002).

II. This Court Should Address Whether Sales Lost To Unrelated Third Parties, Not Favored Purchasers, Are Cognizable Competitive Injuries Under The Act.

To establish a violation of the Act, plaintiff must establish that "the discrimination had a prohibited effect on competition." *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990). The competitive injury cognizable under the Act includes "injury to competition between the favored and the disfavored purchaser" – so-called "secondary-line" injury. *Texaco*, 496 U.S. at 571.

A number of courts of appeals have indicated that there is no competitive injury in secondary-line cases unless the favored buyer and disfavored buyer are in actual competition with respect to the same specific customer or customers. The Second Circuit articulated this requirement in *Best Brands Beverage v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987). "In order to establish the requisite competitive injury in a secondary-line case, plaintiff must first prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential." 842 F.2d at 584. The Fifth Circuit has stated that in Robinson-Patman Act cases, "competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692 (5th Cir. 2003). *See also Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, 63 F.3d 1267, 1271 (3d Cir. 1995); *National Distillers & Chem. Corp. v. Brad's Mach. Prods.*, 666 F.2d 492, 496 (11th Cir. 1982).

Here, all but two of the instances of price discrimination alleged by Reeder-Simco GMC do not involve competition with another Volvo dealer.[4] The court of appeals, however, rejected a

[4] The two exceptions identified by the court of appeals – the two occasions when plaintiff was bidding against another Volvo dealer for the same deal – were the plaintiff's bid for the sale of twelve trucks to Hiland Dairy Company and its bid for a five-truck sale to Tommy Davidson. Pet. App. 4a, 11a-12a.

requirement of "direct head-to-head competition" between plaintiff and the dealers who allegedly received more favorable terms. Pet. App. 17a. It determined that sales lost to non-Volvo dealers were also cognizable injuries to competition. Yet the plaintiff in those bids was in competition only with dealers of other brands of trucks, and any lost sales and lost profits were lost to those non-Volvo dealers – not to Volvo dealers granted favorable treatment by Volvo.

This approach represents a significant expansion of the Act. In the context of competitive bidding, there will always be one or more disappointed bidders. Under the theory of the court below, a disappointed dealer-bidder will always have a cause of action under the Act if the manufacturer has previously offered a larger discount to another dealer in connection with a different bidding process (or if the manufacturer subsequently does so). The practical effect of such a doctrine is to eliminate competitive injury as a distinct requirement, and, ultimately, to forbid any variations in discounting. This Court should address whether "inter-brand" losses such as those involved here are cognizable under the Robinson-Patman Act.

CONCLUSION

For the foregoing reasons and for the reasons stated by petitioner, the Court should grant the petition for certiorari.

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